Advertising and Personal Injury Suits—Should Puffing be a Defense?

By Douglas Whitman*

The defense of puffing often prevents plaintiffs from recovering for misrepresentations and breaches of warranty that are caused by false advertising. This article contends that the elimination of this defense would be consistent with the theory that businesses should behave in a socially responsible manner. Businesses would thus have to bear the responsibility for any misrepresentations that they make in their advertising and could not rely on a claim that the advertising is merely opinion or loose, general praise.

Introduction: The Obligation of Business to Act Responsibly

Should businesses operate in a socially responsible manner? If businesses fail to do so, should the law be expanded to force them to act in a fair manner?

Many persons believe that when a business achieves the highest profits possible it fulfills all its obligations to society. The chief spokesman for this position, Dr. Milton Friedman, contends that the most socially responsible role for business entails making a profit, using resources efficiently, and obeying the law.[1] He contends that as an employee of the shareholders, a corporate executive goes against his employers' interests when he has a " 'social responsibility' in his capacity as businessman."[2]

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[1] Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. Times, Sept. 13, 1970, § 6 (Magazine), at 122-26.

[2] *Id.*

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Opponents of social involvement by business offer other arguments against business filling a socially responsible role. One ar-

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> In a free-enterprise, private property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society. . . .
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> What does it mean to say that the corporate executive has a "social responsibility" in his capacity as businessman? If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interests of his employers. For example, that he is to refrain from increasing the price of the product in order to contribute to the social objective of preventing inflation, even though the price increase would be in the best interests of the corporation. Or that he is to make expenditures on reducing pollution beyond the amount required by law in order to contribute to the social objective of improving the environment. . . .
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> In each of these cases, the corporate executive would be spending someone else's money for general social interest. Insofar as his actions in accord with his "social responsibility" reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending the customer's money. Insofar as his actions lower the wages of some employees, he is spending their money.

Id. Dr. Friedman's views are similar to those of the 18th century English political economist, Adam Smith. Smith believed that the best way to achieve social goals was for the individual to maximize the use of his capital. Smith believed that individual success benefits society.

> As every individual, therefore, endeavors as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value, every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants and very few words need be employed in dissuading them from it.

A. SMITH, WEALTH OF NATIONS, Book IV, Ch. 2 (1776), *quoted in* R. HAY & E. GRAY, BUSINESS AND SOCIETY: CASES AND TEXT 1 (2d ed. 1981).

gument is that if business is forced into assuming social obligations, the additional costs will drive marginal firms out of the market. Other commentators argue that businessmen lack the insight and skills to make proper social choices.[3] Still others argue that business already possesses enough power and influence over our lives.[4]

The modern mainstream of thought favors requiring business to act in a socially responsible manner.[5] Proponents of this view prefer straightforward advertising that avoids lies and deceptions.[6] But not everyone shares this view. Some commentators contend that deception is necessary in business.[7]

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[3] Davis, *The Case For and Against Business Assumption of Social Responsibilities*, ACAD. MGMT. J., June 1973, at 312.

[4] For a fascinating look at how business uses human behavior theories in advertising to manipulate, control, and direct consumer behavior, see V. PACKARD, THE HIDDEN PERSUADERS (1980).

[5] The different views that support a socially responsible role for business can be loosely placed into two main categories: "trustee" management and "quality of life" management. Both the "trustee" and "quality of life" concepts are relatively new. The trusteeship concept emerged in the 1930s. According to this concept, corporate managers are responsible not only for maximizing the stockholders' wealth but also for maintaining an equitable balance between customers, employees, suppliers, creditors, and the community, all of whom are "contributor groups" to the business. The manager was seen as a "trustee" for the various contributor groups to the firm rather than simply an agent for the owners. R. HAY & E. GRAY, *supra* note 2, at 5-7.

The "trustee" theory holds that business should be responsible for equal employment opportunity, quality of the work environment, and other issues of immediate concern to the firm's various contributor groups. However, this responsibility does not extend to any responsibility to society in general. Government, not business, should be primarily responsible to society. The proponents of the "trustee" view claim that is why people pay taxes.

The "quality of life" concept expands the trustee concept. Under this view, business has a duty not only to the various contributor groups to the firm but also to society. Business may not ignore the rest of the society to which it belongs. Holders of this view agree that business has a responsibility for equal employment opportunity. They also assert that business has a responsibility to aid in solving societal problems such as overpopulation, economic instability, and pollution.

[6] Harvard Business Review published a survey of the attitudes of 700 businessmen toward ethical situations. Only 28% of those responding to the survey agreed that the social responsibility of business is to stick to business. Brenner & Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV., Jan.-Feb. 1977, at 57-71.

[7] *See* Carr, *Is Business Bluffing Ethical?*, HARV. BUS. REV., Jan.-Feb. 1968, at 144.

In certain instances advertisers distort the truth. When an advertiser chooses to present something less than a clear, honest representation of the attributes of his product, a very serious question arises regarding a company's liability for any damages caused by this deception. The doctrine of puffing[8] serves as the chief vehicle through which advertisers avoid liability for misrepresentations in the products liability area.[9] Quite often, companies that advertise fail to portray accurately the attributes of their products. Inaccurate advertising leaves consumers with a false impression of the qualities of the product.

This article contends that puffing should not be an allowable defense in a personal injury action that is based on a claim of false representation in advertising. It first examines the various legal theories that plaintiffs use in these cases. It then looks at the difficulties that puffing creates for plaintiffs. It concludes that a business that acts in a socially responsible manner must bear the responsibility for any misrepresentations that it makes in its advertising. Thus, if advertising misleads a consumer, the advertiser should not be able to escape liability by arguing that the statement in question was simply loose, general praise on which the consumer had no right to rely.

I. Legal Restraints on Creativity in Advertising

Advertisers face numerous regulatory restraints on their freedom to construct advertisements that effectively promote their products. Since 1971, the Federal Trade Commission (FTC) has

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> Most executives from time to time are almost compelled in the interests of their companies or themselves, to practice some form of deception when negotiating with customers, dealers, labor unions, governments or even other departments in their companies. By conscious misstatements, concealments of pertinent facts or exaggeration—in short by bluffing—they seek to persuade others to agree with them. I think it is fair to say that if the individual executive refuses to bluff from time to time—if he feels obligated to tell the truth . . . he is ignoring opportunities permitted under the rules and is at a heavy disadvantage in his business dealing.

Id. See also Blumenthal, *Is Truth a Bar to Creativity?*, Advertising Age, Oct. 9, 1978, at 75.

[8] Mere sales talk or statements of opinion regarding a product cannot be the basis of liability for misrepresentation. *See* notes 89-128 and accompanying text *infra*.

[9] *See* notes 87-128 and accompanying text *infra*.

insisted that advertisers be able to substantiate their advertising claims.[10] Those advertisers who fail to meet the FTC requirements[11] may face a cease and desist order.[12] Further, the FTC may now order corrective advertising.[13]

Advertisers face an additional legal concern. An untrue or misleading advertisement may give rise to a products liability suit for personal injuries.[14] The following sections trace the historical development of the plaintiff's cause of action for misrepresentation in advertising.

A. Fraud

Historically, injured parties in products liability actions relied on a claim of fraud as the basis for recovery. The plaintiff would

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[10] *See* Pfizer, Inc., 81 F.T.C. 23 (1972) (an affirmative product claim is "unfair" unless there is a reasonable basis for that claim); FTC Resolution, 36 Fed. Reg. 12058 (1971), as amended, 36 Fed. Reg. 14680 (1971). For a history of the advertising substantiation program, see Note, *The* Pfizer *Reasonable Basis Test—Fast Relief for Consumers But a Headache for Advertisers,* 1973 DUKE L.J. 563; Note, *The FTC Ad Substantiation Program,* 61 GEO. L.J. 1427 (1973).

[11] FTC guides set forth these advertising requirements. *See, e.g.,* Guides against Deceptive Pricing, 16 C.F.R. part 233 (1981); Guides against Bait Advertising, 16 C.F.R. part 238 (1981); Guides against Deceptive Advertising of Guarantees, 16 C.F.R. part 239 (1977); Guides for Advertising Allowances and other Merchandising Payments and Services, 16 C.F.R. part 240 (1981). For a summary of deceptive advertising practices barred by the FTC, *see generally* G. ALEXANDER, HONESTY AND COMPETITION (1967); E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971).

Courts have recognized puffing as a defense to FTC charges of deception. *See, e.g.,* Carlay v. F.T.C., 153 F.2d 493 (7th Cir. 1943) (describing weight reducing plan as "easy" was puffing); Kidder Oil Co. v. F.T.C., 117 F.2d 892 (7th Cir. 1941) (representation that product will enable automobile to operate an "amazing distance" without oil and is a "perfect" lubricant was puffing). *See also* Gulf Oil Corp. v. F.T.C., 150 F.2d 106 (5th Cir. 1943); National Dynamics Corp., 82 F.T.C. 488 (1973).

[12] *See* Federal Trade Commission Act, 15 U.S.C. § 53 (1977).

[13] Warner-Lambert Co., 86 F.T.C. 1398 (1975), *modified,* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). *See* Note, Warner-Lambert Co. v. F.T.C.: *Corrective Advertising Gives Listerine a Taste of Its Own Medicine,* 73 Nw. U.L. Rev. 957 (1978) [hereinafter cited as *Corrective Advertising*]. *See also* sources cited at note 18 *infra.*

[14] *See generally* Sales, *The Innocent Misrepresentation Doctrine: Strict Tort Liability Under Section 402B,* 16 Hous. L. Rev. 239 (1979); Whitman, *Reliance as an Element in Product Misrepresentation Suits: A Reconsideration,* 35 Sw. L.J. 741 (1981).

allege that the defendant had made an intentional, material misrepresentation upon which the plaintiff relied, and that the misrepresentation caused the plaintiff to suffer physical injury.[15]

This cause of action has never posed a serious problem for advertisers because the plaintiff bears a formidable burden of proof. The plaintiff must establish the defendant's *knowledge or belief* that the representation is false, *intent* to induce the plaintiff to take action, and *justifiable reliance* by the plaintiff on the misrepresentation.[16] Given this burden, few plaintiffs today rely upon fraud as a basis for recovery.

A plaintiff who does prove fraud, however, may recover actual or "compensatory" damages that result from the misrepresentation. In addition, courts may award "punitive" damages to punish the defendant for his wrongdoing.[17] The spectre of a massive damage award should thus deter at least some advertisers from intentionally misrepresenting their products. The FTC's power to issue a cease and desist order, as well as to order corrective advertising upon proof of misrepresentation, should provide a further deterrent.[18]

B. Negligent Misrepresentation

A company that avoids intentional misrepresentations may nonetheless unintentionally misrepresent its products to the general public through advertising. This could lead to a suit based on a theory of negligent misrepresentation, which involves a false representation made by a person who has *no reasonable*

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[15] L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 17.01 (1980).

[16] *See, e.g.,* Marsh v. Usk Hardware Co., 73 Wash. 543, 132 P. 241 (1913). In *Marsh,* plaintiff prevailed on a theory of fraud. The manufacturer distributed a circular which stated that its product, Jexite, was "absolutely safe to handle in every way," and could not "be exploded unless confined." The plaintiff nonetheless sustained personal injuries as a result of the product's premature explosion. *Id.* at 546, 132 P. at 243. *See also* Roberts v. Anheuser Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912) (plaintiff may recover if he establishes that advertiser *knew* of the statement's falsity). Proving knowledge, however, has been a major stumbling block. *See* Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946).

[17] *See generally* Igoe, *Punitive Damages in Products Liability,* 34 J. Mo. B. 394 (1978).

[18] *See generally* Comment, *Corrective Advertising—The Federal Trade Commission's Response to Residual Deception,* 10 CONN. L. REV. 1035 (1978); Comment, *Corrective Advertising: Panacea or Punishment,* 17 DUQ. L. REV. 169 (1978-79); *Corrective Advertising, supra* note 13.

grounds to believe that it is true, although he may not know it is untrue or believe it is untrue.[19] Few products liability plaintiffs use negligent misrepresentation because it involves difficult problems of proof.[20]

C. Express Warranty

Express warranty often serves as the basis for a product misrepresentation suit.[21] Many advertisements create express warranties. The advertisement need not indicate a specific intention on the part of the seller to make a warranty.[22] Advertisers may expressly warrant their product without using formal words such as "warrant" or "guarantee."[23] A seller may create an express

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[19] W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 229 (1979).

[20] *See, e.g.*, Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960) (court permitted recovery where plaintiff sustained injuries when his car went out of control after the service manager at the dealership from which plaintiff purchased his car told plaintiff that the clicking sound he heard in the automobile was normal, when in fact the service manager had no basis for his statement).

[21] U.C.C. § 2-313 (1978) provides:

> (1) Express warranties by the seller are created as follows:
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> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
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> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
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> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
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> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

See generally Note, *Express Warranties Arising from Advertising*, 41 J. AIR L. & COM. 497 (1975).

[22] U.C.C. § 2-313(2) (1978).

[23] *Id.* Advertisements clearly may create an express warranty. *See, e.g.*, Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1st Dist. 1968) (seller's representation of certain attributes of its skin cream in advertisements for the product created an express warranty).

warranty simply by describing the goods to a person,[24] showing a sample or model to the buyer,[25] or making any affirmation of fact or a promise to the buyer.[26] An express warranty may also be created by statements on a product's label,[27] in a catalogue, leaflet, or poster,[28] in a magazine or newspaper advertisement, or

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[24] *See, e.g.,* Miles v. Kavanaugh, 350 So. 2d 1090 (Fla. Dist. Ct. App. 1977) (seller of a used airplane gave the prospective buyer the engine and propeller logbook which the court found to constitute a description of the goods); Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. Ct. App. 1976) (where the seller of a floor covering product represented that once the product was applied to a floor, the floor would "absorb considerable flex without cracking," the court found an express warranty); Eddington v. Dick, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (1976) (court regarded seller's statement in advertisement that refrigerator was in good condition as more than a mere statement of opinion and ruled that it created an express warranty by description).

[25] *See, e.g.,* Auto-Teria, Inc. v. Ahern, 170 Ind. App. 84, 352 N.E.2d 774 (1976) (buyers could rely on seller's affirmation and model they saw in purchasing self-service car wash equipment); Pacific Marine Schwabacker, Inc. v. Hydroswift Corp., 525 P.2d 615 (Utah 1974) (piece of molded acrylic and representations made about it created an express warranty regarding durability of acrylic boat).

[26] *See, e.g.,* Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966) (seller asserted that "the use of rust-proof linings in the cans would prevent discoloration and adulteration"); Werner v. Montana, 117 N.H. 721, 378 A.2d 1130 (1977) (seller assured the buyer that ship was water tight); Brodsky v. Nerud, 414 N.Y.S.2d 38 (N.Y. Sup. Ct. 1979) (describing horse as "cold" in racing program and daily racing form regarded as warranty by affirmation); Eddington v. Dick, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (1976) (seller described refrigerator as being in good condition); Ewers v. Eisenzopf, 88 Wis. 2d 482, 276 N.W.2d 802 (1979) (statement that shells were suitable for salt water aquariums was a statement of fact).

[27] *See, e.g.,* Cantrell v. R.D. Werner Co., 226 Kan. 681, 602 P.2d 1326 (1979). In *Cantrell,* the plaintiff purchased an aluminum stepladder from a retail merchant. The box covering the ladder bore the message: "GOOD QUALITY: LIGHT-STRONG-SAFE: RATED LOAD 200 LBS: FOR SAFETY'S SAKE BUY ME. I'M LIGHT AND STRONG! FIVE YEAR GUARANTEE . . . ." *Id.* at 684-85, 602 P.2d at 1329. The plaintiff, who weighed only 165 pounds, sustained injuries when the ladder collapsed. The court held that the statement on the box created an express warranty and allowed the plaintiff to recover. *Id.* at 685, 602 P.2d at 1330-31.

[28] *See, e.g.,* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (where plaintiff purchased a Ford automobile on the basis of defendant car manufacturer's publicly distributed catalogues and other printed matter which represented that all new Ford automobiles had a Triplex shatter-proof glass windshield "so made that it will not fly or shatter under the hardest impact," and a pebble struck the car windshield, causing a small piece of glass to fly into plaintiff's eye, the court found that the statement in the literature created an

on radio or television.[29]

Express warranty serves as an excellent theory of recovery for a personal injury claim based on misrepresentation.[30] In most states a direct contractual relationship between the plaintiff and the defendant need not be established. The plaintiff may recover from anyone in the distributive chain including retailers, distributors, and manufacturers.[31] Thus, whenever a statement appears, the advertiser must make certain that the advertising accurately represents the product's attributes or face the risk of liability.

A plaintiff who attempts to recover for breach of express warranty must, however, establish that the statement in question

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express warranty and allowed plaintiff to recover for his loss of eyesight), *aff'd on rehearing*, 168 Wash. 465, 15 P.2d 1118, *second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934).

[29] *See, e.g.*, Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (where defendant's radio broadcast urged the use of a hair permanent solution and stated that no neutralizer was needed, the court held that these statements created an express warranty that the product would work as represented, and allowed plaintiff to recover for contact dermatitis of the scalp and loss of hair that resulted from using the product as directed).

[30] *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-4 (1980). Many persons who were injured by a product that failed to conform to a warranty created in advertising have recovered through a breach of express warranty theory. *Id.*

[31] U.C.C. § 2-318 (1978) permits states to eliminate privity of contract as a requirement. In a state that has adopted Alternative A, the plaintiff must establish that he is a "natural person who is in the family or household of [the] buyer or who is a guest in [the] home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." Alternative B eliminates the requirement that the plaintiff be in the family or household of the buyer, or a guest in the home. Alternative C, the broadest, deletes the term "natural," and consequently covers damages to businesses as well as people.

Comment 3 to § 2-318 indicates that the Code does not take a position regarding suits against someone other than the person or company from whom the product was purchased. Thus, if the purchaser bought the product from a retailer, the Code does not determine whether the plaintiff may sue businesses more remote in the distributive chain. However, comment 3 does provide: "[T]he section in this form is neutral and not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." In Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (recovery based on an implied warranty theory was extended to a user, and the court permitted plaintiff to recover from both the retailer and the manufacturer).

became part of the "basis of the bargain" between the parties.[32] Considerable controversy surrounds the meaning of this phrase. Some commentators argue that the "basis of the bargain" requirement merely shifts the burden of proving nonreliance to the seller.[33] Other writers argue that the Code eliminates the concept of reliance. These writers believe that courts need not focus their attention on the buyer's behavior. These writers contend that unlike the old rule, which required a buyer to establish his reliance on specific words, a seller under the Code must disclaim his statements to avoid being bound by them.[34] Still other writers suggest that a plaintiff who wishes to base his case on an express warranty created in an advertisement must testify that he knew of and relied upon the advertisement in question.[35] This commentator, however, has argued that reliance has no place in a personal injury case based on advertising.[36]

Several defenses are available in express warranty cases. The main defense revolves around whether the advertising merely involved a statement of opinion or loose, general praise, otherwise known as "puffing." Over the years, courts have grown less receptive to this defense. An advertiser therefore cannot rely upon this defense with complete certainty.[37] The Uniform Commercial

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[32] U.C.C. § 2-313(1) (1978).

[33] Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372, 385 (1968); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 285 (1961). U.C.C. § 2-313 comment 8 (1978) also seems to support this position. It declares that "all of the statements of the seller [become part of the basis of the bargain] *unless good reason is shown to the contrary.*" *Id.* (emphasis added).

[34] *See* R. NORDSTROM, LAW OF SALES §§ 66-68 (1970); Note, *"Basis of the Bargain"—What Role Reliance?*, 34 U. PITT. L. REV. 145, 149-51 (1972). *See also* U.C.C. § 2-313 comment 4 (1978). Comment 4 states:

> In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described.

[35] J. WHITE & R. SUMMERS, *supra* note 30, at § 9-4 (citing with approval Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. Ct. App. 1976) in which the Missouri Court of Appeals states that the advertisement in question must have at least been read).

[36] Whitman, *supra* note 14.

[37] 1 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 14.03[1] (1978).

Code, however, specifically provides that "an affirmation *merely* of the value of the goods or a statement purporting to be *merely* the seller's opinion or commendation of the goods does not create a warranty."[38]

D. Implied Warranties

1. The Implied Warranty of Merchantability

Not all warranties arise from an express agreement between the parties. The implied warranty of merchantability arises by operation of law rather than from any language in the contract between buyer and seller.[39] This warranty applies to sales of

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[38] U.C.C. § 2-313(2) (1978) (emphasis added). Comment 8 to § 2-313 suggests a test to distinguish statements of value or opinion:

> What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? [A]ll of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain.

See also R. NORDSTROM, *supra* note 34, at § 70.

> The line between warranty and puffing is one that evades specific rules. The problem is that of determining the basis of the bargain—the justifiable expectations of the buyer—and words that are warranties in one situation can be sales talk in another, depending upon their impact on the resulting bargain. The answer is to be determined by the trier of fact from the surrounding circumstances and the manner in which words were used.

Id.

[39] U.C.C. § 2-314 (1978) provides:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
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> (2) Goods to be merchantable must be at least such as
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> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and
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> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) are adequately contained, packaged, and labeled as the agreement may require; and

goods by a merchant, including sales for use and sales for resale.[40]

The Code lists a number of specifications that goods must meet in order to be merchantable. The goods must "pass without objection in the trade."[41] Fungible goods must be of "fair average quality within the description."[42] The latter specification requires that goods generally be of a certain quality, but may include some of the best and some of the worst quality, and quantity may vary as permitted by agreement.[43] If the transaction requires a certain type of container, package, or label, these items must be adequate.[44] The goods must conform to any affirmation of fact that the seller makes on the container or label.[45] However, the most fundamental requirement for purposes of merchantability is that the goods are "fit for the ordinary purposes for which such goods are used."[46]

All these requirements create a minimum standard. In order to be merchantable, goods must "at least" meet all the requirements listed in section 2-314(2). Other attributes of merchantability may be added by case law[47] and implied warranties may arise from a usage of trade or course of dealing.[48]

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

[40] U.C.C. § 2-314 comment 1 (1978). The fact that § 2-314 applies only to present sales and contracts to sell goods at a future time limits its use. However, the Code has been used in non-sale situations such as leases and bailments. *See, e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); R. NORDSTROM, *supra* note 34, at § 21.

[41] U.C.C. § 2-314(2)(a) (1978). A question might arise regarding the point in time at which the goods pass without objection. If goods are received in a sealed container, the defect may not be apparent until the goods have been opened. Thus, the test is: "[N]ow that the defect in the product is known, would the product pass without objection in the trade under its contract description?" R. NORDSTROM, *supra* note 34, at § 76.

[42] U.C.C. § 2-314(2)(b) (1978).

[43] *Id.* § 2-314(2)(d).

[44] *Id.* § 2-314(2)(e).

[45] *Id.* § 2-314(2)(f).

[46] *Id.* § 2-314(2)(c) and comment 8. Comment 8 indicates that this warranty protects a purchaser for resale. Thus to be merchantable, goods must be honestly resalable in the normal course of business.

[47] *Id.* § 2-314 comment 6.

[48] *Id.* § 2-314(3). The U.C.C. defines course of dealing and usage of trade:

Sellers and buyers may agree to exclude or modify the implied warranty of merchantability.[49] The seller's ability to limit his implied warranties pose problems for a plaintiff in a misrepresentation suit. Additionally, in order to be liable for breach of an implied warranty of merchantability, the defendant must be a merchant with respect to the type of goods in question.[50] Thus, the requirement of establishing the merchant status of the defendant may also raise difficulties.[51]

On the more positive side, the plaintiff who sues based on the implied warranty of merchantability need not establish reliance on the statement.[52] The plaintiff need not show any knowledge of a defective representation that arises from the failure of the product to meet ordinary expectations. These expectations are presumed.[53]

2. The Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose also arises from the sale of a product.[54] This warranty arises upon

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> (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Id. § 1-205.

[49] *See id.* §§ 2-316, 2-718, 2-719.

[50] *Id.* § 2-314(1).

[51] For purposes of the U.C.C., a merchant is defined as:

> [A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 2-104(1).

[52] J. WHITE & R. SUMMERS, *supra* note 30, at § 9-6.

[53] U.C.C. § 2-314(2)(c) (1978). *See* Phillips, *Product Misrepresentation and the Doctrine of Causation,* 2 HOFSTRA L. REV. 561 (1974).

[54] U.C.C. § 2-315 (1978).

showing two elements. The seller must *at the time of contracting* have reason to know "any particular purpose for which the goods are required" and "that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."[55] Advertising may create this warranty.[56]

The seller need not be a merchant in order to be liable for breach of an implied warranty of fitness for a particular purpose. However, the typical situation involves a merchant.[57] Since the seller need not be a merchant, the injured party might use an implied warranty of fitness theory against non-merchant sellers.

The injured party may further be able to allege breach of the implied warranty of fitness even though the goods are merchantable. Goods may fail to perform as the buyer anticipated, although they conform to express warranties and are merchantable. Courts must carefully examine the facts to determine whether an implied warranty of fitness arose at the time of contracting as a result of the seller knowing the particular purpose for which the buyer intended to use the goods.

A seller need not possess actual knowledge of the buyer's particular purpose or of the buyer's reliance on the seller's skill and judgment. However, the buyer must actually rely on the seller.[58] Thus, the plaintiff must establish reliance to prove the existence of an implied warranty of fitness.

Courts may consider the use of a trade name as one factor in deciding whether the buyer actually relied on the seller, but it is not of itself decisive.[59] The Uniform Sales Act, the predecessor

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> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

Id.

[55] *Id.*

[56] *See, e.g.*, Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (advertising broadcast on the radio created an implied warranty of fitness for plaintiff's use).

[57] U.C.C. § 2-315 comment 4 (1978). "Although normally the warranty will arise only where the seller is a merchant with the appropriate 'skill or judgment,' it can arise as to non-merchants where this is justified by the particular circumstances." *Id.*

[58] *Id.* § 2-315 comment 1. *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 9-9.

[59] U.C.C. § 2-315 comment 5 (1978).

of the U.C.C., barred finding an implied warranty of fitness when a seller offered a specified article under its patent or trade name.[60] This rule posited that the buyer relied on the trade name rather than the seller's assertions in purchasing the product. To eliminate the problems of proving reliance that arose with respect to trade names and patents, the drafters of the U.C.C. intentionally omitted the language of the Uniform Sales Act.[61] Today, sales executed under a patent or trade name do not automatically exclude the implied warranty of fitness.[62]

E. Innocent Misrepresentation

Today, a plaintiff in a personal injury action who wishes to base his claim upon a misrepresentation in an advertisement need not establish intent to deceive, negligent deception, or breach of warranty. An advertiser may be strictly liable for physical harm resulting from a misrepresentation of a product's character or quality, even though the misrepresentation is innocent and made without fraud or negligence.[63]

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[60] UNIF. SALES ACT § 15(4) (1950).

[61] U.C.C. § 2-315 comment 5 (1978). The drafters intended a major extension of the warranties when they eliminated the " 'patent or other trade name' exception."

[62] *Id.* If the buyer insists on a particular brand, and he is not relying on the seller's skill and judgment, there is no warranty. "But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes." *Id.*

> The basic test, under the code, will be whether or not the buyer relied on the seller to select the goods. Purchase by trade name may or may not be an indication of such reliance: it is only one factor to be considered in reaching the final conclusion. While it may indicate no reliance at all, if it is coupled with other factors, including an awareness by the seller of the use to be made of the product, there could still be reliance by the buyer and the creation of the warranty.

Dusenberg & King, *Sales and Bulk Transfers*, 3 U.C.C. SERV. (MB) § 7.02[2] (1978).

[63] RESTATEMENT (SECOND) OF TORTS § 402B (1965). Section 402B provides:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

The theory of innocent misrepresentation has developed over time. Originally, courts ruled that a seller incurred no liability for physical harm caused by the use of a product in the absence of contract privity between the buyer and the seller. *Langridge v. Levy*[64] developed an exception to the privity requirement for fraudulent misrepresentation. The remedy at that time lay in deceit.[65] The law of innocent misrepresentation eventually culminated in the leading case of *Baxter v. Ford Motor Co.*,[66] in which the court allowed recovery for a "non-contractual express warranty" made to the consumer in the form of a representation to the public upon which the consumer relied.[67]

Section 402B of the Restatement (Second) of Torts expanded upon the prior decisions in adopting a theory of recovery to cover misrepresentations of material facts. In the comments to section 402B, the drafters of the Restatement warn courts not to confuse innocent misrepresentation with a contractual theory of recovery. Innocent misrepresentation provides liability in tort, not in contract. The Restatement thus distinguishes innocent misrepresentation from the warranties involved in the ordinary sale of goods situation.[68]

A plaintiff who sues under an innocent misrepresentation theory need not establish a direct contractual relationship with the

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(a) it is not made fraudulently or negligently, and
(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

[64] 2 M. & W. 519, 150 Eng. Rep. 863 (1837). *See also* Pasley v. Freeman, 100 Eng. Rep. 450 (1789) (action for deceit appropriate despite lack of contractual relationship).

[65] RESTATEMENT (SECOND) OF TORTS § 557A (1977) offers the most recent definition of deceit: "One who by a fraudulent misrepresentation or nondisclosure of fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other."

[66] 168 Wash. 456, 12 P.2d 409 (1932), *aff'd on rehearing*, 168 Wash. 465, 15 P.2d 1118, *second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934). The manufacturer's literature stated that the car windshield would not shatter. The plaintiff relied on this statement in purchasing the car. He recovered for a loss of eyesight caused when a pebble struck and shattered the windshield.

[67] RESTATEMENT (SECOND) OF TORTS § 402B comment d (1965).

[68] *Id.* § 402A comment m applies, insofar as it is pertinent, to § 402B. While the Restatement does not prevent courts from treating § 402B as creating liabilities for breach of warranty, it indicates that it would be simpler to regard liability under § 402B as one of strict liability in tort in order to avoid confusion.

seller.[69] The Restatement's elimination of the privity requirement makes sense in light of current mass advertising and marketing techniques. In the past it was assumed that the promise of a warranty induced buyers to make purchases. This would certainly be a dubious assumption today. Years ago, the Supreme Court of Ohio observed that few consumers see or understand warranties on consumer products.[70] The New York Court of Appeals has also noted the impact of modern merchandising on a decision to purchase a product.[71] The move away from re-

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[69] *Id.* § 402B (noting that the seller may be liable even though "the consumer has not bought the chattel from or entered into any contractual relation with the seller"). *See generally* Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976).

[70] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). The court stated:

> The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss? In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products.

Id. at 248-49, 147 N.E.2d at 615.

[71] Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). The court stated:

> The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published repre-

quiring privity thus understandably has been widely accepted by authors in the products liability field.[72]

Innocent misrepresentation applies to anyone engaged in selling any type of chattel. Section 402B eliminates the problem of vertical privity, permitting a plaintiff to sue not only the product's manufacturer, but also the distributor, wholesaler, and retailer.[73]

To give rise to liability, the innocent misrepresentation must appear in some medium intended to either reach the public or induce purchase of the product.[74] A caveat to the Restatement leaves open the issue of liability for representations made only to individuals.[75]

The Restatement limits the scope of section 402B to injuries sustained by consumers. However, it suggests that courts liberally interpret "consumer" to include any person who uses a chattel in a manner in which a purchaser might be expected to use the product.[76] This means, for example, that section 402B could probably be used by an employee whose employer purchases a product or by the spouse of a purchaser of a car. The section is not confined to purchasers, nor persons in the family or household of the purchaser. A caveat leaves open the question of section 402B's applicability to nonconsumers.[77]

The Restatement also leaves open the question of bystander recovery under section 402B.[78] Given the paucity of litigation on this point,[79] liability to bystanders under section 402B remains unclear. Thus, although the Restatement greatly minimizes the

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sentations caused him to make the purchase.

Id. at 12-13, 181 N.E.2d at 402, 226 N.Y.S.2d at 367-68.

[72] *See, e.g.*, Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 999-1009, 1018 (1957); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134-38 (1960).

[73] RESTATEMENT (SECOND) OF TORTS § 402B comment e (1965).

[74] *Id.* § 402B comment h (1965).

[75] The Caveat states: "The Institute expresses no opinion as to whether the rule stated in this Section may apply (1) where the representation is not made to the public, but to an individual. *Id.* § 402B Caveat.

[76] *Id.* § 402B comment i.

[77] *Id.* § 402B Caveat states: "The Institute expresses no opinion as to whether the rule stated in this Section may apply (2) where physical harm is caused to one who is not a consumer of the chattel."

[78] *Id.*

[79] W. KIMBLE & R. LESHER, *supra* note 19, at 115.

problems associated with who may qualify as a plaintiff, it fails to eliminate them entirely.

Innocent misrepresentation only applies to liability for physical harm caused by the misrepresentation. In the past, when a plaintiff sustained a pecuniary loss the Restatement provided a parallel rule in proposed section 552D.[80] But the fact that the proposed section clearly applied to pecuniary harm caused to the consumer did not prevent some courts from confusing the two causes of action.[81]

In order to recover for innocent misrepresentation the plaintiff must establish his justifiable reliance upon a misrepresentation of a material fact concerning the character or quality of the product sold.[82] Proving reliance poses serious problems for injured parties and prevents many plaintiffs from recovering.[83]

The requirement of establishing the advertisement's materiality poses another stumbling block for hopeful plaintiffs. The statement must be one that would be important to a normal buyer. It must be the type of misrepresentation that an advertiser should expect to influence a purchaser.[84] Section 538 of the Restatement classifies a matter as material if a reasonable person would have regarded the misrepresented fact to be important in determining his actions, or if the maker of the representation knows that the recipient will attach importance to the

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[80] RESTATEMENT (SECOND) OF TORTS § 552D (Council Draft No. 17, 1963). This section provides:

> One engaged in the business of selling chattels, who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

[81] *See, e.g.*, Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966). In *Adkins*, although the plaintiff had sued for property damage, the court stated that Tennessee law requires reliance in property damage cases, referring to § 402B comment a. 446 F.2d at 1108. This confusion of property damage cases with personal injury claims does not help clarify the law on this point. *But see* Walker Truck Contractors, Inc. v. Crane Carrier Co., 405 F. Supp. 911 (E.D. Tenn. 1975) (court correctly refused to apply § 402B because the plaintiff had not sustained a personal injury).

[82] RESTATEMENT (SECOND) OF TORTS § 402B comment j (1965).

[83] *See generally* Whitman, *supra* note 14.

[84] RESTATEMENT (SECOND) OF TORTS § 402B comment g (1965).

statement.[85] In addition, to be material the advertisement need not be the sole inducement to purchase or use the chattel. It need only be a substantial factor in its purchase or use.[86]

II. The Requirement of Misrepresentation of Material Fact

A. Materiality Under Theories Other Than Innocent Misrepresentation

To prove fraud, the plaintiff must establish evidence of a false representation of a material fact.[87] Many courts have rejected the plaintiff's cause of action because they construed the seller's statements as mere puffing.[88] The plaintiff, therefore, must establish that the misrepresentation relied upon was of fact and not mere opinion.[89]

A similar limitation applies to claims of negligent misrepresentation. Mere sales talk regarding a product will not lead to liability for negligent misrepresentation.[90]

The Uniform Commercial Code establishes a clear rule with respect to puffing and express warranties.[91] A statement that a court regards as puffing or sales talk cannot be the basis of an express warranty theory.[92] The cases regrettably fail to establish

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[85] Restatement (Second) of Torts § 538 (1977). Thus, even if a reasonable person would not regard the misrepresented fact as important, it could still be considered material if the person who made the statement knew or had reason to know that it was important to the recipient.

[86] Whether an advertisement is ever the basis for a purchase may be questioned. *See* Whitman, *supra* note 14, at 125-30.

[87] 4A Personal Injury § 1.03[1] (L. Frumer, *et al.* eds 1969).

[88] *See, e.g.,* Universal C.I.T. Credit Corp. v. Sohm, 15 Utah 2d 262, 391 P.2d 293 (1964); Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946).

[89] *See* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 706, 60 Cal. Rptr. 398, 411 (1st Dist. 1967); Haserot v. Keller, 67 Cal. App. 659, 670-71, 228 P. 383, 388 (2d Dist. 1924).

[90] *See, e.g.,* Evans v. Sears Roebuck & Co., 49 Ga. App. 744, 176 S.E. 843 (1934) (pages from the defendant's sales catalog were properly excluded as mere sales talk).

[91] U.C.C. § 2-313(2) (1978). "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* A statement of opinion may become an express warranty under the Code if it is a part of the basis of the bargain. *See id* § 2-313 comment 8; Ezer, *supra* note 33, at 287 n.39.

[92] Courts generally find the advertising statements that are not mere sales

clearly the type of statements that constitute express warranties and the type that comprise nonactionable puffing.[93]

Probably the most commonly cited rule for determining whether a statement constitutes puffing or an express warranty appears in what might be called the fact-opinion rule:

> The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the buyer may be expected also to have an opinion and to exercise his judgment that . . . General statements to the effect that goods are "the best," . . . or one "of good quality," . . . or will "last a lifetime" and be "in perfect condition" . . . are generally regarded as expressions of the seller's opinion or "the puffing of his wares" and do not create an express warranty.[94]

Cases that have found a statement to be puffing or not to be puffing have failed to provide a specific rule for their decision. One group of cases seems to turn on the *specific language* involved.[95] Another group emphasizes the role of reliance in decid-

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talk to be express warranties. *See, e.g.*, Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[93] *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 9-3. These authors conclude that the law in this area is very murky and indicate that an attorney cannot say exactly what statements constitute puffing.

> The lesson for a lawyer . . . is obvious. Only a foolish lawyer will be quick to label a seller's statements as puffs or not puffs, and only a reckless one will label a seller's statement at all without carefully examining such factors as the nature of the defect (was it obvious or not) and the buyer's and seller's relative knowledge. The cases also suggest that the nature of the plaintiff's reliance is not as irrelevant as the Code and comments appear to say it is. To some courts the puff-warrant question is a back door means of examining the nature and reasonableness of the plaintiff's reliance.

Id.

[94] Royal Business Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 41-42 (7th Cir. 1980). *See also* General Supply & Equip. Co. v. Phillips, 490 S.W.2d 913 (Tex. Civ. App. 1972), where the court states this test: "Did seller assume to assert a fact of which buyer is ignorant, or did he merely express a judgment about a thing as to which they may each be expected to have an opinion[?]" *Id.* at 917.

[95] These cases do not state a particular definition of puffing under U.C.C. § 2-313. However, the seller's specific statement seems to influence the court's decision. In Bicketh v. W. R. Grace & Co., 12 U.C.C. Rep. 629 (W.D. Ky. 1972), the court found no express warranty. The plaintiff sued, alleging failure of defendant's corn to perform to plaintiff's satisfaction. The court found that the

ing the outcome.[96] In a third group of cases, specific circumstances arguably influenced the courts.[97]

While puffing clearly creates a problem for plaintiffs in express warranty cases, no puffing difficulties arise under the implied warranties of merchantability or fitness for a particular purpose. Both implied warranties arise by operation of law. The implied warranty of merchantability does not depend on a statement by anyone. The implied warranty of fitness for a particular purpose, however, may arise as a result of a statement by the seller. For example, in *Filler v. Rayex Corporation*,[98] plaintiff lost the use of his right eye when a fly ball hit the right side of his sunglasses. Plaintiff's baseball coach had supplied the sunglasses. The coach had read an advertisement which indicated that the sunglasses provided instant eye protection.[99] Because these glasses shattered on impact they were not fit for the particular purpose for which they were sold: use by baseball players for eye protection. The company therefore breached the implied

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statement in the manual provided by the dealer, "very good standability, can stand high population under adequate fertility program good blight tolerance, high test weight," to be puffing. Contrast *Bicketh* with Matlock v. Hupp Corp., 57 F.R.D. 151 (E.D. Pa. 1972). In *Matlock*, the plaintiff bought a cement truck engine from Hupp. The engine failed to perform as expected. Matlock sued on the theory that two documents created an express warranty. One document was a letter written by a Hupp salesman that stated, "we have the engine that will 'fill the bill.' " The other was a Hupp brochure on the engine which recited the engine's performance data. The court allowed this case to go to a jury based on an express warranty theory. The statements in *Bicketh* and *Matlock* seem equally general.

[96] *See, e.g.*, Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974). The seller sued the purchaser for nonpayment for fertilizer. The buyer, Tyndall, counterclaimed for breach of an express warranty that the fertilizer was good for growing tobacco. The court found for Tyndall because his losses were caused by his reliance on the plaintiff's false representation. *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 9-3 (arguing that the outcome in puffing cases depends on the reliance issue). *But see* Whitman, *supra* note 14, at 130-32 (arguing that reliance should not be an element of misrepresentation).

[97] *See, e.g.*, Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc., 536 F.2d 806 (8th Cir. 1976); Sessa v. Riegle, 427 F. Supp. 760 (E.D. Pa. 1977); Heil v. Standard Chem. Mfg. Co., 223 N.W.2d 37 (Minn. 1974). J. WHITE & R. SUMMERS, *supra* note 30, at § 9-3, indicate that the following factors suggest that a statement is an opinion and not a warranty: (1) the specificity of the statement; (2) whether the statement is oral or written; and (3) whether it is a statement in a contract or an advertisement.

[98] 435 F.2d 336 (7th Cir. 1970).

[99] *Id.* at 337.

warranty of fitness for a particular purpose.[100]

B. The Requirement of Materiality Under an Innocent Misrepresentation Claim

An innocent misrepresentation cause of action only arises in the presence of material misrepresentations. Statements of opinion or loose, general praise, otherwise known as puffing, will not give rise to an innocent misrepresentation claim.[101] The statement in question must be the type of statement that could be expected to influence a normal buyer.[102]

In general, courts recently have not been favorably disposed towards puffing as a defense in innocent misrepresentation claims. The trend has been to find representations to be of a material fact.[103] This is especially true when the representation deals with the safety of a product.[104] While a seller still may

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[100] *Id.* at 338. The statement in question arguably could be construed as puffing and therefore not be actionable under a theory of implied warranty of fitness for a particular purpose. However, research has not revealed a discussion of puffing in cases arising under U.C.C. § 2-315.

[101] RESTATEMENT (SECOND) OF TORTS § 402B comment g (1965). *See* L. FRUMER & M. FRIEDMAN, *supra* note 15, at § 16B[1]. The California Supreme Court examined the materiality of the representation "Completely Safe Ball Will Not Hit Player" in Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). The court found that this representation made to a beginning golfer would be material. The injured party had testified that he was impressed with the product's safety. *Id.* at 117, 534 P.2d at 382, 120 Cal. Rptr. at 688. In Klages v. General Ordnance Equip. Corp., 240 Pa. Super. 356, 367 A.2d 304 (1978), the defendant marketed a mace weapon. In its leaflets, the manufacturer stated that the product "Rapidly vaporizes on face of assailant effecting *instantaneous incapacitation* . . . . It will *instantly stop and subdue* entire groups . . . ." *Id.* at 360-61, 367 A.2d at 311 (emphasis in original). The court examined the materiality of this statement, considering comments f and g of § 402B. The court found that the statement was clearly material in light of the mace weapon's use in extremely dangerous circumstances. 240 Pa. Super. at 370, 367 A.2d at 306-11.

[102] *See* RESTATEMENT (SECOND) OF TORTS § 538 (1977).

[103] *See* Ezer, *supra* note 33, at 286 and n.38; Comment, *Express Warranties and Greater Consumer Protection from Sales Talk,* 50 MARQ. L. REV. 88, 89-90 (1966).

[104] W. KIMBLE & R. LESHER, *supra* note 19, at § 114. Kimble and Lesher state: "What has become clear from the more recent decisions is that any statement about a product will be treated as a representation of fact if the court can find even the most strained or tenuous basis for doing so." *Id. See, e.g.,* Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Rogers

make generalized statements of praise, the clear trend is to restrict findings of puffing.[105]

However, a number of courts have found statements made by the seller to be harmless puffing. In *Hoffman v. A.B. Chance Co.*,[106] a hydraulic aerial platform installed on a 1965 Ford truck threw the plaintiff to the ground. The truck's micro brake lock device had malfunctioned, catapulting him off the truck. Plaintiff pursued recovery under several theories, including one based on section 402B of the Restatement. The plaintiff had relied on defendant's statement that "their product offered unprecedented safety." The court categorized the statement as one of opinion, which under comment g to section 402B constituted nonactionable puffing.[107]

In a remarkable case, *Berkebile v. Brantly Helicopter*

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v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[105] R. NORDSTROM, *supra* note 34, at § 70. *See also* Hauter v. Zogarts, 14 Cal. 3d 104, 112 n.7, 534 P.2d 377, 381 n.7, 120 Cal. Rptr. 681, 685-86 n.7 (1975), stating that it is necessary to construe the seller's language in favor of the buyer to counteract "the shrewd technique of those sellers who, instead of making broad factual assertions about their products, seek to couch their representations in opinion form." *But see* 1 G. ROSDEN & P. ROSDEN, *supra* note 33, at § 14.03[1], where the authors, after noting that puffing has lost judicial appeal, observe:

> With the introduction of increasingly stricter rules in the field of products liability, and particularly in view of the dire consequences of strict liability for products, courts are apt to accept as harmless puffery something they would not condone otherwise, where the consequences of strict liability seem to be out of line with the weight of the advertising statement.

[106] 339 F. Supp. 1385 (M.D. Penn. 1972).

[107] *Id.* at 1388. Plaintiff later amended his pleading, claiming that the defendant had represented that "it was unnecessary to have another person in the cab of the vehicle while the equipment was being operated." The court found that a jury could reasonably regard this statement as a misrepresentation of a material fact. Hoffman v. A.B. Chance Co., 346 F. Supp. 991, 992 (M.D. Penn 1972). Contrast the result in *Hoffman* with that reached in a number of cases holding that assertions of safety may be misrepresentations of fact. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (representation that cigarettes "can cause no ills"); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960) (tires described as "safe" within stated limits); Hamon v. Digliani, 148 Conn. 710, 197 A.2d 294 (1961) (representation implying that detergent was safe for all household tasks); Spiegel v. Saks 34th St., 43 Misc. 2d 1065, 252 N.Y.S.2d 852 (1965), *aff'd*, 26 A.D. 661, 272 N.Y.S.2d 972 (1966) (representation that cosmetic was "safe").

Corp.,[108] Berkebile died when the helicopter he was piloting crashed while gaining altitude. Brantly had advertised the helicopter as "safe, dependable," not "tricky to operate," and one that "beginners and professional pilots alike agree . . . is easy to fly."[109] Plaintiff contended that these statements constituted a misrepresentation of a material fact concerning the character or quality of the helicopter. The Pennsylvania Supreme Court affirmed the trial court's categorization of these statements as mere puffing and its refusal to instruct the jury on the issue of innocent misrepresentation.[110]

In *Jack Roach-Bissonet, Inc. v. Puskar*,[111] the court ruled in favor of the defendant because the evidence failed to demonstrate the falseness of the representation upon which the plaintiff relied. In the owner's manual for all 1959 Thunderbirds, the Ford Motor Company had stated: "even if your engine is stopped or if the power system should not be operating normally, you will have safe steering and sure control of your car with conventional steering."[112] The plaintiff asserted that he relied upon the representations at the time of purchase and until the accident that gave rise to the lawsuit. The automobile dealer had reassured him not to worry about his stalling. In spite of the fact that Ford had misstated a material fact about the quality of 1959 Thunderbirds in its owner's manual, and that the plaintiff had relied upon the representation, the majority found no liability. The dissent, however, felt that Puskar's reliance established a cause of action for breach of warranty and misrepresentation.[113]

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[108] 462 Pa. 83, 337 A.2d 893 (1975).

[109] *Id.* at 88, 337 A.2d at 897.

[110] *Id.* at 96, 337 A.2d at 903. This case illustrates the dangers of giving a court discretion to determine what is or is not puffing. The statements "safe, dependable," and not "tricky to operate" cannot be any less a misrepresentation of a material fact concerning the character or quality of the product, than the statement "Completely Safe Ball Will Not Hit Player" in Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). The power to classify a statement as puffing or not puffing leaves the plaintiff's recovery to the judge's whim.

[111] 417 S.W.2d 262 (Tex. 1967).

[112] *Id.* at 271 (Smith, J., dissenting).

[113] *Id.* at 274 (Smith, J., dissenting). *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (en banc); Long v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Inglis v. American Motors Co., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); Ford Motor Co. v. Lonon, 217

Despite these cases, the clear trend is toward rejection of puffing as a defense to innocent misrepresentation claims. An important case in this area is *Hauter v. Zogarts.*[114] Plaintiff's mother had bought him a product called the "Golfing Gizmo," a training device designed to help unskilled golfers improve their games. The plaintiff sustained serious head injuries while practicing his golf swing with the Gizmo. He had relied upon the statement "Completely Safe Ball Will Not Hit Player." The court concluded that this statement constituted a factual representation.[115]

In another innocent misrepresentation case rejecting puffing as a defense, *Crocker v. Winthrop Lab., Division of Sterling Drug, Inc.,*[116] Glenn Crocker became addicted to Talwin, a new drug produced by Winthrop Laboratories. The company previously had believed the drug to be nonaddictive. After Crocker's death, his widow sued for damages for Crocker's suffering from his addiction and his subsequent death.[117] Winthrop's descriptive material about the drug did not warn of the possibility of addiction. The 1967 edition of Physician's Desk Reference Manual indicated an "absence of addiction liability." The defendant's agent had represented to Crocker's doctor that the drug was as harmless as aspirin and had no addicting effect. The court found misrepresentation and held Winthrop Laboratories liable.[118] The court stated:

Tenn. 400, 398 S.W.2d 240 (1966) (discussed in notes 125-128 and accompanying text *infra*).

The puffing defense is irrelevant if a court finds no *false* representation. *See, e.g.,* General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971). Advertising brochures regarding plaintiff's 1976 Chevrolet pickup truck had touted its "telescoping steering column" as one of a "host of new safety features." *Id.* at 728. Plaintiff suffered permanent injuries in a collision when the steering column failed to telescope when he struck it. The court ruled that G.M. had complied with the advertisement's representation, noting that G.M.'s statement "regarding the new safety features in the advertisement never asserted that the steering column would telescope under any and all circumstances and conditions." *Id.*

[114] 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975).

[115] *Id.* at 117-18, 534 P.2d at 382, 120 Cal. Rptr. at 689.

[116] 514 S.W.2d 429 (Tex. 1974).

[117] *Id.* at 429.

[118] *Id.* at 433. The court rejected the lower court's finding that there was no liability because the manufacturer could not have reasonably foreseen harm to an appreciable number of persons, since the drug was not unreasonably dangerous to the ordinary user. *Id.* at 432. The court said:

> Whatever the danger and state of medical knowledge, and however rare the susceptibility of the user, when the drug company positively and specifically represents its product to be free and safe from all dangers of addiction, and when the treating physician relied upon that representation, the drug company is liable when the representation proves to be false and harm results.[119]

Another important case finding liability under Restatement section 402B is *Klages v. General Ordnance Equipment Corp.*[120] Klages, a motel employee, obtained a leaflet describing the effectiveness of certain mace weapons manufactured by General Ordnance and indicating that mace would immobilize attackers instantly.[121] While Klages was on duty, two people entered the

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> The failure to warn of a danger cannot always be excused by the mere fact that the potentially endangered users are few in number. Furthermore, some products, though manufactured as designed and intended, are so dangerous in fact that the manufacturer should be liable for resulting harm though he did not and could not have known of the danger at the time of marketing.
>
> . . . .
>
> [I]t can be made reasonably safe by being marketed with adequate warning. If the manufacturer knows or should know of potential harm to a user because of the nature of its product, the manufacturer must give an adequate warning.

Id. at 432-33.

See generally Bosko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); RESTATEMENT (SECOND) OF TORTS § 402A comment k; Keeton, *Products Liability—Drugs & Cosmetics*, 25 VAND. L. REV. 131 (1972); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398 (1970).

[119] Crocker v. Winthrop Laboratories, Div. of Sterling Drug, Inc., 514 S.W.2d 429, 433 (Tex. 1974). *See also* Brown v. Globe Laboratories, 165 Neb. 138, 84 N.W.2d 151 (1957); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[120] 240 Pa. Super. 356, 367 A.2d 304 (1976). *See generally* Comment, *Products Liability—Breach of Warranty—Strict Liability in Tort—Restatement (Second) of Torts § 402B*—Klages v. General Ordnance Equipment Corp., 23 N.Y.L. SCH. L. REV. 307 (1977).

[121] Klages v. General Ordnance Equip. Corp., 240 Pa. Super. 356, 367 A.2d 304 (1976).

> 'Rapidly vaporizes on face of assailant effecting *instantaneous incapacitation* . . . . It will *instantly stop and subdue* entire groups . . . . *instantly stops assailants in their tracks* . . . . an attacker is *subdued—instantly*, for a period of 15 to 20 minutes . . . . Time Magazine stated the chemical Mace is 'for police the first, if not the final, answer to a nationwide need—a weapon that *disables as effectively* as a gun and yet does no permanent injury' . . . . The

hotel and directed Klages to open the safe. Klages squirted mace on one man's face, and then ducked below the cash register. Following Klages behind the counter, the intruder shot him in the head. The lower court instructed the jury on both misrepresentation of a material fact under section 402B and breach of express warranty under U.C.C. section 2-313. The superior court decided that the absence of privity should not prevent a plaintiff from recovering and that state law mandated the adoption of section 402B.[122] The defendant asserted that Klages' use of the product under dangerous circumstances established the defense of assumption of the risk. While assumption of the risk constitutes a defense to a strict liability claim,[123] the court rejected it as a defense for innocent misrepresentation under section 402B.[124]

The materiality issue has also arisen in cases involving a commercial loss, as opposed to a physical injury, where the seller makes a misrepresentation to the public. In *Ford Motor Co. v. Lonon*,[125] a farmer sued for mechanical defects in his Ford tractor. Ford had provided brochures to potential customers and engaged in an extensive advertising program. Relying on a brochure that he had obtained from a Ford dealership and on the advertising program, the farmer purchased the tractor. The tractor proved mechanically defective and never functioned properly. The court noted that section 402B applies only to misstate-

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> effectiveness is the result of a unique, *incapacitating formulation* (patent pending), projected in a shotgun-like pattern of heavy liquid driplets that, upon contact with the face, cause extreme tearing, and a *stunned,* winded condition, often accompanied by dizziness and apathy.'

Id. at 357, 367 A.2d at 306-07 (emphasis in original).

[122] *Id.* at 365-66, 367 A.2d at 309-10. The Pennsylvania Supreme Court has permitted direct suits against manufacturers in several breach of warranty cases. *See* Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968) (abrogated vertical privity in breach of warranty actions); Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974) (eliminated horizontal privity requirements in breach of warranty actions). The Pennsylvania Supreme Court adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

[123] RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

[124] Klages v. General Ordnance Equip. Corp., 240 Pa. Super. 356, 371-72, 367 A.2d 304, 312 (1976).

[125] 217 Tenn. 400, 398 S.W.2d 240 (1966).

ments of material fact and not to mere sales talk.[126] The court, however, sustained liability against Ford under section 402B and the parallel Restatement rule that related to pecuniary loss,[127] since evidence existed that supported a finding by the jury that the defendant had made material misstatements.[128]

Despite the trend away from readily finding puffing in product misrepresentation cases, defendants may still claim that the misrepresentation upon which the plaintiff relied was a statement of opinion and not fact. The ability of defendants to make this claim places a heavy burden on the plaintiff, given the inconsistency among courts in determining what constitutes a material fact. Additionally, it may be argued that the modern view of socially responsible business further militates against allowing advertisers to escape liability through a claim that they were merely "puffing their wares."

III. The Ethics of Misrepresentation

If the advertisement in question is a relatively innocuous statement, such as product X tastes better than product Y, it is debatable whether the puffing defense should be disallowed. When the consumer suffers little harm, strong arguments in favor of permitting puffing can be made. However, as the consequences to the consumer increase, so does the need for control.

Many consumers wish to purge the country of misleading advertising, and many business executives believe that eliminating untruthful and misleading advertising is the most important

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[126] *Id.* at 406, 398 S.W.2d at 247. The court noted that the Restatement had a proposed tentative draft that dealt with pecuniary losses resulting from a misrepresentation by the seller. Restatement (Second) of Torts § 552D (Council Draft No. 17, 1963), set forth at note 80 *supra*.

[127] Restatement (Second) of Torts § 552D (Council Draft No. 17, 1963).

[128] Ford Motor Co. v. Lonon, 217 Tenn. 400, 416, 398 S.W.2d 240, 250 (1966). *See also* Walker v. Decora, Inc., 225 Tenn. 504, 471 S.W.2d 778 (1971) (court applied the holding from *Ford Motor Co. v. Lonon* to find a misrepresentation in that the product was not suitable for its use as presented in defendant's sales materials). *But see* Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971), where the court disallowed plaintiff's recovery for property damage based on a misrepresentation in defendant's pamphlets and advertisements, stating that "[g]eneral assurances of good quality and sales talk are not enough. Since there was no evidence of any assurance of quality in any particularity, misrepresentation was not established . . . ." *Id.* at 1108.

goal for improving advertising.[129] Businesses have voluntarily taken steps aimed at improving advertising ethics. Many industries have formulated codes of conduct for their members, and industry associations have attempted to upgrade the ethics of member businesses.[130] Further, advertising organizations have attempted to improve the ethics of advertisers.[131]

It may be asked whether truthful advertising makes any difference. Advertising apparently does have an impact on its recipients. One commentator, Carl Madden, observed that television advertisements may permanently distort children's views of morality. Madden claims that business has acquired, through technology, what "is potentially the greatest character-forming instrument of the century."[132] This arguably being the case, he asks, "Why are private corporations and their executives the appropriate managers of the most powerful process ever created for mass acculturation of human beings?"[133]

The appropriateness of permitting false statements to be made about a product is a major issue in light of the tremendous capacity of the media to influence the character of people. This issue is particularly important when statements that may seriously harm the public are considered. Additionally, as Madden argues, why should executives, as opposed to society, decide what is appropriate or inappropriate? This is particularly important if the argument that a corporation gains some advantage by lying or twisting the truth in its advertising is accepted. Moreover, these advantages are gained over honest, truthful businessmen.

Many businessmen regard themselves as the proper decision-makers regarding the content of an advertising message. The

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[129] Greyser & Reece, *Businessmen Look Hard at Advertising,* HARV. BUS. REV., May-June 1971, *quoted in* O. KLEPPNER, ADVERTISING PROCEDURE 45 (6th ed. 1973). It might be contended that the market forces advertising to be ethical. "Advertising is ethical not because of the motivations of its practitioners but because of the consequences of its operation. . . . The market power of consumers will force advertisers to act in ways that benefit society." Nelson, *Advertising and Ethics,* in ETHICS, FREE ENTERPRISE AND PUBLIC POLICY 188 (R. DeGeorge and J. Pichler eds. 1978).

[130] L. QUERA, ADVERTISING CAMPAIGNS 237, 261-62 (2d ed. 1977).

[131] C. SANDAGE & B. FRYBURGER, ADVERTISING THEORY AND PRACTICE 84 (9th ed. 1975).

[132] Madden, *Forces Which Influence Ethical Behavior,* in THE ETHICS OF CORPORATE CONDUCT 76 (C. Walton ed. 1977).

[133] *Id.* at 77.

classic argument asserts that the market should be as free from government intervention as possible. Proponents of this argument contend that, as Adam Smith wrote,[134] if the market is permitted to operate by itself, the market will convert individual actions that are motivated by the pursuit of private gain into social benefit. Consequently, they argue deceptive advertising will not succeed because, if a buyer is dissatisfied, he will not become a repeat purchaser.[135] They further argue that for deception to exist, someone must be ready to be misled by the statement, and few knowledgeable consumers are willing to be deceived.[136]

Other commentators disagree with the view that in the long run the market takes care of false and misleading statements. A former Federal Trade Commission executive states, "the problem again is that regardless of what economic models say about the likelihood of debunking advertising, it is relatively rare as a practical matter."[137] Perhaps part of the problem is that businessmen feel that business should be judged only by economic criteria.[138] If advertising sells products, they regard it as success-

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[134] A. SMITH, WEALTH OF NATIONS, Book IV, Chapter 2 (1776). *See* note 2 *supra*.

[135] Nelson, *supra* note 129, at 190. Nelson contends:

> Consumer market power generates information for advertising precisely because that information is in the self-interest of producers to provide. Hence, there is little incentive for deceptive advertising under the aegis of consumer market power. In contrast, state police power, involving the expenditure of resources, will never be enforced vigorously enough to eliminate all incentives for fraudulent advertising even in terms of the legal definition of fraud that prevails at the moment.

Id. at 193. However, this argument is not persuasive with respect to durable goods which are purchased infrequently.

[136] *Id.* at 192. There are not a great number of persons willing to be misled. In a study conducted in the mid-1960s, 53% of the persons sampled said that advertising does not present a true picture of the products advertised. Bauer & Greyser, *Advertising in America: The Consumer View, quoted in* O. KLEPPNER, *supra* note 129, at 42.

[137] Pitofsky, *The Changing Focus in the Regulation of Advertising*, in ADVERTISING AND SOCIETY 136 (Y. Brozen ed. 1974).

[138] Kristol, *Business Ethics and Modern Man*, Wall St. J., March 20, 1979, at 22, col. 4. "[B]usinessmen have come to think that the conduct of business is a purely economic activity, to be judged only by economic criteria, and that moral and religious traditions exist in a world apart, to be visited on Sundays perhaps." *Id. See also* notes 1-2 *supra*.

ful, and therefore ethical.

While businessmen may view restraints on advertising as bad for the economic system, eliminating false advertising arguably could increase competition by giving consumers correct information upon which to make a rational decision.[139] Unfortunately, the reverse probably prevails. Consumers have little accurate information and a great deal of distorted information. Misleading information can be dangerous.

> Freedom itself is threatened by those who can already assume the right to pervert the truth for their own narrow ends. Unfortunately, advertisers have devoted much of their skill to the artful presentation of half-truths and lies, to deception of the eye and of the mind, to the creation of illusions and false expectations. These skills have proven themselves in the marketplace. False promises and clever double talk have been effective selling tools . . . . False promises, lies and other deceptions *are* effective. They can make money for those who use them. They can help to drive honest competitors out of business, for it is simply not true that the truth ultimately will come out. Even if it does, it may come out too late for the honest but bankrupt merchant.[140]

Whatever the impact of false advertising on the public or on business, it is questionable whether courts should permit sellers to make false and misleading statements. At a time of increasing public outcry for greater social responsibility in business, courts should seek to encourage a higher ethical standard for business. By permitting some false and misleading statements, courts are lowering business ethics. Surely the reverse should be the case. When a misstatement results in grave consequences to an injured party, puffing cannot be justified as a defense. To let a business escape liability in this situation rewards the unethical business and penalizes the innocent injured party.

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[139] Kintner & Green, *Opportunities for Self-Enforcement of Codes of Conduct: A Consideration of Legal Limitations*, in ETHICS, FREE ENTERPRISE AND PUBLIC POLICY 257 (R. DeGeorge and J. Pichler eds. 1978).

[140] Leiser, *The Ethics of Advertising*, in ETHICS, FREE ENTERPRISE AND PUBLIC POLICY 183 (R. DeGeorge and J. Pichler eds. 1978). However, not everyone agrees with Burton Leiser. Indeed, some feel that puffing is permissible. "Hyperbole plays a useful role in advertising. Exaggeration makes advertising more memorable. The more memorable the advertising, the more efficient it will be from both a private and social point of view, simply because memorability makes advertising perform its information function better." Nelson, *supra* note 129, at 194.

IV. Eliminating Puffing as a Defense

Although the American system permits businesses to function in their own best interests, *some* restraints on the scope of business activity must be recognized. The modern mainstream of thought recognizes that business ought to behave in a socially responsible manner. It is socially responsible to use advertising techniques that convey the sponsor's message in the most direct and straightforward manner and avoid half-truths and deception.

Deceptive and misleading advertising has few consequences in many cases. However, advertising of this sort ultimately may drive the honest businessman out of the market because the deceptive advertiser may gain some critical short term advantage over the honest merchant.[141] In this sense, deceptive advertising may be detrimental to the long term economic interests of the country. Ensuring that consumers receive accurate and undistorted information clearly enables consumers to make more intelligent decisions.

Deceptive advertising also effects the character of the viewing public. Advertising is "potentially the greatest character-forming instrument of the century."[142] It is questionable whether control of this powerful device should be left to the marketplace, where unethical advertisers can manipulate the public to their short term advantage while possibly distorting their long term values.

Added to these two powerful considerations is the plight of a person who is injured as a result of a misleading advertisement. When a court considers an advertising statement that distorts a product's attributes, it is not fair to permit the advertiser to escape liability for personal injuries by arguing that the statement in question is puffing. The advertiser probably made a particular statement with the intent to influence the buying response of its audience. Therefore, the advertiser should be held liable for the consequences of the statement whatever its character.

This argument is particularly valid in the case of personal injuries that arise from a claim made in an advertisement. It is true that a strong contention may be made for preserving the puffing defense in the typical commercial sales case, where the consequences are relatively innocuous. Puffing should not be a

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[141] *See* note 140 and accompanying text *supra*.

[142] Madden, *supra* note 132, at 77.

defense, however, in a personal injury case when the statement has caused grave consequences for the injured party. Eliminating the puffing defense in personal injury suits would establish a much more understandable rule. It would remove from these suits the capricious element of determining whether a statement constitutes puffing.[143] Consumers and companies would then face a clear-cut rule: Businesses must make every effort not to distort the attributes of their products in advertising. Consumers could thus rely with confidence on products as advertised. If a business did misrepresent its products, and a person sustained a personal injury, the company could not rely upon puffing as a defense to liability.

CONCLUSION

The defense of puffing severely limits the power of plaintiffs to recover under any of the misrepresentation or warranty theories in products liability cases. Puffing should not be a defense in personal injury suits based on advertising. The elimination of this defense will improve and simplify these theories as vehicles for recovery. It will also help reconcile the law in this vital area with the generally widespread belief that business should behave in an ethically responsible manner. If misrepresentations are somehow involved in stimulating demand for a product, the advertiser should bear the responsibility for those misrepresentations.

Eliminating the puffing defense will penalize only unethical or careless advertisers. This rule would, however, further business ethics, greatly clarify the burden of proof in misrepresentation cases, and place the loss on the party who is responsible for the improper statement.

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[143] *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 9-3 (predicting whether a case will be regarded as puffing is a difficult task at best). *See also* note 93 *supra*.